Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

TONY LUTTRELL,

Petitioner,

vs.

VICKIE WILSON and TAMMY PRICE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

HON. WINTER R. HUFF
LAW OFFICES OF JOHN G. PRATHER
P.O. Box 616
Somerset, KY 42502-0616
Telephone: (606) 679-1626
Counsel of Record for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether a public school teacher accused of sexual contact with students can be deemed both a "state actor" and "acting under color of law" for purposes of imposition of Section 1983 liability when said teacher, if he acted as alleged, would not only be acting wholly beyond the scope of his duties but instead in violation of his duties;

(2) Whether students' claims of sexual harassment which would not be actionable under Title VII can nevertheless constitute a violation of a constitutional right to bodily integrity actionable under Section 1983;

(3) Whether the consideration of the admission of evidence under Federal Rule of Evidence 415 requires balancing under Federal Rules of Evidence 403 and 404.

PARTIES TO THE PROCEEDING

A list of all parties to this proceeding is contained in the caption to this Petition. In the action in the United States Court of Appeals for the Sixth Circuit, there were two additional Defendants-Appellees, namely, David Webb, individually and in his official capacity as Superintendent of the Edmonson County Board of Education, and David Stice, in his individual and official capacity (Principal of the Edmonson County High School at the relevant time). However, David Webb and David Stice are not necessary parties in this proceeding. There are no parent companies or non-wholly-owned subsidiaries of the Petitioner.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Tony Luttrell, respectfully requests that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit, filed on September 13, 2000, has not been recommended for full-text publication, and is reproduced herein in the Appendix at pages 1-28. The Judgment upon jury verdict of the United States District Court, Western District of Kentucky, Bowling Green Division, entered on August 5, 1998, is reproduced herein in the Appendix at pages 29-30. The Order of the United States Court of Appeals for the Sixth Circuit denying the Petition for Rehearing En Banc, filed on October 30, 2000, is reproduced herein in the Appendix at pages 31-32.

STATEMENT OF JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit was filed on September 13, 2000, as set forth in the Appendix at pages 1-28. The Petition for Rehearing by the United States Court of Appeals for the Sixth Circuit was denied by Order entered on October 30, 2000, as set forth in the Appendix at pages 31-32.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED IN THIS CASE

The Fifth Amendment to the United States Constitution provides, in relevant part, that no person shall "be deprived of life, liberty, or property, without due process of law . . . ".

The Fourteenth Amendment to the United States Constitution provides in relevant part " . . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . . ". 42 U.S.C. § 1983 provides in relevant part, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ".

Federal Rule of Evidence 415, 28 U.S.C., governs evidence of similar acts in civil cases concerning sexual assault or child molestation, and provides, in relevant part, that " . . . evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules . . . this rule

should not be construed to limit the admission or consideration of evidence under any other rule." Federal Rule of Evidence 404 provides, in relevant part, that "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action and conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ". Federal Rule of Evidence 403 provides that, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence."

STATEMENT OF THE CASE

The Petitioner, Tony Luttrell ("Luttrell"), was a public high school teacher in Edmonson County, Kentucky. He had taught for a number of years without incident. In October of 1993, the Respondent Tammy Price ("Price") accused Luttrell of touching her in the vaginal area when she ran into him while exiting the classroom. Price was taken out of Luttrell's class, and had no further contact of any kind with him.

In February of 1994, the Respondent Vickie Wilson ("Wilson") accused Luttrell of numerous acts of sexual contact and misconduct, which reportedly began in the spring of 1993 and continued through December of 1993.

Wilson filed an action asserting claims, *inter alia*, pursuant to section 1983 in April of 1994, and was joined thereafter by Price.

At trial, Price testified that Mr. Luttrell was standing in the classroom doorway with his hands behind his back as she was leaving his classroom during class change. Price testified that she asked Luttrell to move, and that he looked around and smiled at her, at which time one of his hands came back and brushed her in her vaginal area for a few seconds. She admitted she did not return to Luttrell's classroom after that day, and had neither verbal nor physical contact with Luttrell thereafter. Evidence was presented on behalf of Luttrell at trial demonstrating that, given Price's height and her own testimony as to the distance between herself and Luttrell when the contact occurred, the contact could not have been in her vaginal area. Three eyewitnesses to the incident all testified that the contact between Luttrell and Price appeared to be accidental. Price admitted having poor grades in Luttrell's class, and admitted being angry with Luttrell. One witness testified that she heard Price say she was mad at Luttrell, and wanted to get rid of him.

Wilson claimed forcible sexual contact on two occasions in Luttrell's classroom during the lunch break, and another off campus incident when she allowed Mr. Luttrell to place his finger in her vagina and expose his penis to her. Wilson admitted that she had a "crush" on Luttrell beginning in 1992-3 school year, and that she spent a lot of time around Mr. Luttrell even after the occasions when she testified he forcibly had sexual contact with her. She admitted going on a field trip with his class (optional for her), touching him, hitting him, joking with him, and

stopping her vehicle on a country road at night to talk to him on at least two occasions. She admitted that she wanted to marry him. Wilson was 17 years old when the alleged sexual contact with Luttrell first occurred.

Wilson's testimony regarding the off-campus incident differed markedly from the testimony of another eyewitness, Becky Sanders Ray. Both Wilson and Ray admitted lying under oath on various occasions when relaying this story prior to trial.

Over strenuous and repeated objections, Wilson and Price were allowed to present testimony from a number of other students regarding claims that Luttrell touched and patted students on the breast and buttock area (through clothing), and comments made by Luttrell which could be construed as sexual innuendo. Evidence was presented that most of these other witnesses had grade and/or discipline problems with Luttrell. None of these witnesses had made any contemporaneous reports or documentation of their claims of improper comments and conduct by Luttrell. One witness even admitted that she had given incriminating statements about Luttrell to the Respondents and school officials because of pressure from other students and because she was mad at Luttrell over classroom discipline.

Luttrell presented evidence from many students who were otherwise situated to have seen or heard any such improper comments and conduct by Luttrell towards the Respondents and their witnesses, yet who testified they neither saw nor heard anything which could be considered sexual in nature. Numerous teachers testified that

they neither saw nor heard anything unusual from Luttrell's classroom during the lunch period, casting doubt on Wilson's claim of screaming and crying during those incidents. Further, teachers testified they did not notice either Price or Wilson being upset after alleged incidents as claimed. Wilson's testimony that she had been locked inside of Luttrell's classroom was shown to be false by use of a videotape of the classroom door, demonstrating that the classroom door can always be opened from the inside of the classroom; it cannot lock anyone inside the classroom.

The evidence at trial indicated that Wilson deliberately sought out the company of Mr. Luttrell, both at school and outside of school. She came to his home. She went over to talk to him whenever she saw him out in the community. She was not a student in any of his classes; her contact with him at school was due to her own voluntary action. Many students and teachers testified as to her pestering conduct around him. The Respondent Wilson admitted she went to great lengths to spend time around Mr. Luttrell, not only at school, but at his home and in the community as well. Respondent Wilson was at least 17 years old at all relevant times. Price was 14 years old at the time of the one and only incident at issue involving her. Luttrell consistently and vehemently denied all claims of misconduct, but in light of the jury verdict this Petition addresses only the legal issues rather than factual findings.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The initial action was brought in the United States District Court for the Western District of Kentucky pursuant to 28 U.S.C. § 1343.

REASONS FOR ALLOWANCE OF THE WRIT OF CERTIORARI

I. LUTTRELL COULD NOT HAVE ACTED "UNDER COLOR OF LAW"

The decision of the United States Court of Appeals for the Sixth Circuit in this case conflicts with clear holdings of this Court, the Tenth Circuit, and of the Sixth Circuit itself concerning when a person acts "under color of law" for purposes of imposition of liability under section 1983. This Court has long made the appropriate distinction between constitutional deprivations actionable under 42 U.S.C. § 1983, and torts which merely happen to be committed by state officials or state employees. *E.g. Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981); *Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984); *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). However, the Fifth Circuit in particular, and now the Sixth Circuit, however, have gone astray by misapplying the "real nexus" test, which was developed in the context of analysis of vicarious or supervisory liability (and which has since been supplanted by the "deliberate

indifference" standard in any event), to hold an individual state employee liable for torts clearly outside of the scope of the employee's authorized duties. Apx. p. 17-18.

The origin of the "real nexus" theory appears to be this Court's decision in *Rizzo v. Goode*, 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976). *Rizzo* involved allegations of police misconduct. This Court held that there was no showing of an "affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy – express or otherwise – showing their authorization or approval of such misconduct." *Id.* at p. 371. In that decision, like most of the subsequent decisions which have applied the "real nexus" theory, the actual focus was on whether the municipal entity could be liable; the individuals who had allegedly committed the acts in question had not even been named as parties therein.

The Tenth Circuit later referenced *Rizzo* in the context of a section 1983 action against school officials for failing to properly investigate the background of a teacher/coach hired by the school district, who sexually molested students during a summer basketball camp. *D.T. by M.T. v. Independent School District No. 16*, 894 F.2d 1176, 1187 (10th Cir. 1990). The Tenth Circuit correctly understood and held that a state employee's conduct in the ambit of his personal pursuits are not acts "under color of state law." *Id.*, p. 1186. In addition to *Rizzo*, the Tenth Circuit relied upon other precedent from this Court, such as *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941); *Screws v. United States*, 325 U.S. 91, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945); *Lugar v. Edmonson Oil Co.*,

Inc., 457 U.S. 922, 936-37, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). *Id.*

Unfortunately, the Fifth Circuit erroneously applied the "real nexus" test to assume that a teacher who engages in sexual conduct with students is a state actor acting under color of law. *Doe v. Taylor Independent School District*, 15 F.3d 443, 452, fn. 4 (5th Cir. 1994). In *Doe*, the "real nexus" test from *D.T.* was discussed in a footnote in *dicta*; the teacher was not even a party in that Fifth Circuit Case. In *Doe*, the Fifth Circuit misread and misapplied the "real nexus" test, by focusing on the nexus between the tortfeasor's **own** duties and the tortfeasor's **own** conduct, instead of on the nexus between the **state's** policy and the conduct of the tortfeasor.[1]

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[1] The Respondents may argue, as did the Fifth Circuit majority, that the *D.T.* case is distinguishable because the sexual contact occurred only off campus, during the summer vacation. However, that is a distinction without a difference for purposes of application of the proper legal analysis under 42 U.S.C. § 1983. The analysis must be whether there is a **direct causal connection between the official authorization or policy** and the acts complained of, **not whether there is merely some nexus because the state employee, who is not a policymaker, took advantage in some way of his public position to commit a tort.** The Respondent Wilson, being age 17, was not even subject to compulsory attendance laws of the Commonwealth of Kentucky, and she clearly chose to place herself in Mr. Luttrell's path. As to the Respondent Price, she was obviously free to change out of Mr. Luttrell's classroom, which she in fact did. Thus, Mr. Luttrell was no more facilitated by his state employment as a teacher to commit any acts of sexual misconduct than he would have been if he had committed the torts in a local grocery store, restaurant, or any other locale where females might be found.

However, several Judges of the Fifth Circuit in *Doe* did understand the distinction between torts committed by state employees and constitutional deprivations carried out "under color of state law" but their excellent dissenting opinions have been largely overlooked. See *Doe, supra*, pp. 465-489, esp. pp. 468 (Judge Garwood, joined by Judges Jones, Smith, Barksdale, Garza and DeMoss), 475-77 (Judge Jones, joined by Judges Garwood, Smith, Barksdale, Garza and DeMoss); 480-9 (Judge Garza). Judge Garza's dissent specifically analyzes the "color of law" requisite of liability under 42 U.S.C. § 1983. Judge Garza considered not only the cases holding that the conduct in issue was not "under color of law" because the conduct was in direct contravention of state law (*Barney v. City of New York*, 193 U.S. 430, 24 S.Ct. 501, 48 L.Ed. 737 (1904); *Snowden v. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 88 L.Ed. 497 (1944) but also considered cases from this Court in which state action was found through a misuse of power (E.g., *Classic, supra*, and *Screws, supra*).

Judge Garza relied also on *Baker v. McCollan*, 443 U.S. 137, 146, 99 S.Ct. 2689, 2696, 61 L.Ed. 2nd 433 (1979): "Even intentional torts do not become constitutional violations merely because the tortfeasors are state officials." *Id.*, page 486. As Judge Garza pointed out, if a teacher who uses his position as a teacher "to press his sexual desires" upon a student could be found to have acted under color of law, "then every intentional tort committed by a state official, which is, essentially, what [the teacher's] conduct amounts to, would give rise to a Section 1983 claim." Judge Garza noted that this Court, however, has explicitly rejected such a broad reading of

section 1983. *E.g., Parratt, supra; Hudson, supra; Daniels, supra.*[2]

Judge Garza's dissent clearly points out the flaw of the majority's reasoning: "**Although Stroud [the teacher] unquestionably abused his position as a teacher, he did not abuse the authority granted to him by the state – the state did not grant him any authority, as a teacher or otherwise, to engage in sexual relations with or sexually fondle minor students.**" *Id.*, page 488 (emphasis added). The majority of the Fifth Circuit, however, and now the Sixth Circuit, missed this key distinction, instead finding a teacher's conduct to be "under color of law" **not** because of any connection between the grant of authority/duties imposed by the state on the tortfeasor, but merely because of a perceived (but see footnote 1, *supra*) connection between the tortfeasor's conduct and his job situs. **Mere facilitation in the commission of a tort due to circumstances of public employment has never been the standard for imposition of liability on an individual under section 1983,** and there is no legal basis for extending section 1983 jurisprudence in this fashion.

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[2] Another anomaly results from the improper use of the "real nexus" standard. An employer is typically not liable for any acts of an employee or agent beyond the scope of employment. Certainly, sexual abuse by a teacher of students is beyond the scope of employment, and absent "deliberate indifference" the school district cannot be held liable. *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998). Hence, if there is no liability of the public employer for a deprivation under color of law because the acts are beyond the scope of employment, then how can the employee have acted under color of law?

Liability of an individual under 42 U.S.C. § 1983 can only be premised upon the use or abuse of power granted by authority of the state. Thus, while a teacher may be liable under section 1983 for excessive or abusive administration of corporal punishment, e.g., *Ingraham v. Wright*, 430 U.S. 651; 97 S.Ct. 1401; 51 L.Ed.2d 711 (1977), or other type of discipline as noted by the majority in *Doe*, p. 451, there is not now, never has been, and never will be any grant of state authority to teachers for any type of sexual conduct or contact with students, and therefore no teacher could exceed or abuse such authority.

The Fifth Circuit and now the Sixth Circuit have gone astray. While the statement that "[i]f the Constitution protects a schoolchild against being tied to a chair or against arbitrary paddlings, then surely the Constitution protects a schoolchild from physical sexual abuse . . . " (*Doe*, p. 451) has some obvious appeal, nevertheless, the Fifth Circuit lost sight of the fact that, **regardless of whether a constitutional deprivation occurred, it is not actionable under section 1983 unless it occurred "under color of law."**[3] Liability of an individual under 42 U.S.C. § 1983 cannot be premised upon a nexus between an

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[3] Because the "real nexus" test has typically been discussed in the context of the public employer's liability for the conduct of its agents, the analysis has been blurred because the public *employer* might nevertheless be responsible for guarding against prohibited conduct by policy and procedure, and the public employer's failure to do so may be deemed an abuse or misuse of its duties under color of law by not having in place or not properly implementing protective policies and procedures. However, the "real nexus" test has been supplanted by the "deliberate indifference" standard in considering the public employer's liability for constitutional violations. *E.g., Gebser v. Lago Vista Independent School Dist., supra.*

employee's position and opportunity or accessability to commit a tort; rather, liability of an individual can only be premised upon the use or abuse of power granted by authority of the state.

In fact, the decision of the United States Court of Appeals for the Sixth Circuit in this case conflicts in principle with its own decision in the prior case of *Doe v. Claiborne County, Tenn.*, 103 F.3d 495 (6th Cir. 1996). There, the Court correctly stated:

> "[A] person does not act under color of state law solely by virtue of [his] relationship to the state," instead, liability depends upon the nature of his conduct . . . (citations omitted) . . . **We conclude that to state a claim for a failure to act when the alleged wrongdoer is not a supervisory governmental official, a plaintiff must separately establish the "color of law" requirement of section 1983 by identifying some cognizable duty that state or federal law imposes upon the alleged "enactor." In the absence of a duty, there is no section 1983 liability because the failure to act cannot be said to have occurred under color of law.**

Id., page 512 (emphasis added).[4]

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[4] Judge Norris, in partial dissent in *Claiborne*, noted "I question the wisdom of the majority in placing this Court on record as saying that commission of a state law sexual assault crime amounts to a constitutional tort under 42 U.S.C. § 1983. Furthermore, that holding runs contrary to this Court's discussion of the question in *United States v. Lanier*, 73 F.3d 1380, 1388-89 (6th Cir. 1996) (en banc). *Id.* at p. 516. Judge Norris' change of heart in the panel decision in this case is both unexplained and inexplicable.

Certainly, no teacher has any "duty" under state or federal law to have any type of sexual contact with students. Thus, the Sixth Circuit ignored its own statement in *Claiborne* to instead follow a misconstrued version of the "real nexus" test. The Respondents argued, and the Sixth Circuit accepted the argument, that Mr. Luttrell could be liable under section 1983 because he was facilitated in the commission of his torts by virtue of his position as a teacher, and consequent proximity to students. Besides the fact that, at least with the respect to Respondent Wilson, Luttrell had ample contact with her by her own choice off of the school premises, the fact remains that Mr. Luttrell's duties as a teacher gave him no power or authority to act in a sexual manner towards students. There is no legal nor logical basis to conclude that if a state employee's conduct is merely "facilitated" by the state employment, then the conduct is "under color of law." That theory simply contrives to meet the "color of law" requisite of section 1983 liability without considering whether any power or authority granted by the state was in any way relevant to the constitutional violation alleged.

The flaw of the Sixth Circuit's reasoning becomes even clearer in light of developments in the "deliberate indifference" standard. This Court has explicitly held many times that there is no *respondeat superior* liability under section 1983. E.g., *Gebser, supra*. If facilitation was an appropriate basis for section 1983 liability, merely by finding that a state employee was "facilitated" in the commission of the tort by virtue of attributes of his position, or indeed, deliberate violation of his job duties,

then the state supervisor/employer would always be liable also, because but for the supervisor/employer putting that employee in that position, there would be no facilitation. This is obviously not the analysis actually employed by the Courts, and it is wholly improper to use such *dicta* to hold the individual public employee liable and yet not use the same analysis in consideration of the public employer's liability.

II. CLAIMS WHICH WOULD NOT BE ACTIONABLE UNDER TITLE VII AS SEXUAL HARASSMENT CANNOT CONSTITUTE A DEPRIVATION OF CONSTITUTIONAL DIMENSIONS

A further flaw in this case (and in *Doe v. Taylor Independent, supra,* and also in *Doe v. Claiborne County, supra)* is the apparently automatic **assumption** that any sexual contact or relationship between a teacher and student results in a violation of the student's constitutional right of bodily integrity. This assumption is unwarranted, particularly in the circumstances involving Respondent Wilson, a 17-year-old who admittedly threw herself at her teacher, on whom she had a crush. A sexual relationship between an adult male and a 17-year-old girl, while perhaps deemed immoral, is not *per se* against the law. Under the admitted facts of this case, Wilson could not have stated a claim against Luttrell for sexual harassment under Title VII, because she never gave him any indication that his conduct towards her was unwelcome. *Meritor Savings Bank v. Vinson,* 477 U.S. 57 (1996).

The Petitioner is not aware of any other reported decisions finding a deprivation of a constitutional right of

"bodily integrity" under facts similar to Wilson's claim; the other decisions involve students below the age of consent. *E.g., Doe v. Claiborne County, Tenn., supra.*[5] The dissenting Judges in *Doe v. Taylor Independent, supra,* likewise questioned the assumption that a 15-year-old could not engage in consensual sexual relations without a deprivation of a constitutional right. *Doe v. Taylor Independent,* pp. 467-8. It is certainly questionable on the facts of this case. The Sixth Circuit in this decision attempted to evade the issue by claiming there was sufficient evidence for the jury to find Wilson did not consent, but the panel wholly failed to analyze whether there was a constitutional deprivation at all in light of her age and own conduct. Apx. pp. 18-19.

The panel decision similarly failed to specifically address the argument of Luttrell that Respondent Wilson's single claim of improper touching, on which the evidence was equivocal at best, could amount as a matter of law to a constitutional deprivation. Rather, the panel simply skimmed over that argument, citing *Lillard v. Shelby County Board of Education,* 76 F.3d 716 (6th Cir. 1996) without distinguishing it from the facts of this case. Apx. p. 19. Again, there is no reported decision known by Luttrell holding that a single contact between teacher and student, which occurred by the student's own admission at least in part because she ran into the teacher, and

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[5] In that case, the student was 14 years old when she began what otherwise appears to have been a consensual relationship with a teacher at her high school. The teacher pled to statutory rape. There is an interesting postscript: the student and teacher have since married.

which several eyewitnesses testified appeared to be accidental, amounts to a constitutional violation. Price's claims should have been dismissed.[6]

III. THE ADMISSION OF "OTHER BAD ACTS" EVIDENCE FROM NON-PARTIES WAS IMPROPER; THE FEDERAL RULES OF EVIDENCE MUST BE INTERPRETED TO REQUIRE BALANCING AMONG THE RULES

The panel disposed of Luttrell's arguments concerning the improper admission of irrelevant and/or unduly prejudicial evidence in a single paragraph. Apx. p. 22. The panel simply states that they "find no abuse of discretion in the Court's decision and affirm for the reasons stated by the District Court." Although the panel decision does not specify, presumably, the panel can only be referring to the District Court's pre-trial Memorandum Opinion and Order which primarily relied upon two Eighth Circuit cases from 1997 to the exclusion of other relevant precedent, and otherwise misapplied the law and Federal Rules of Evidence. The Federal Rules of Evidence must be

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[6] The panel agreed that the standard which should have been applied by the District Court is whether the conduct "shocks the conscience." Apx. pp. 19-20. The panel failed to consider, however, whether the single incident as alleged by Price, who admitted that she ran into Luttrell from behind, and in light of the uniform eyewitness testimony that it appeared to be accidental, could be conduct which "shocks the conscience." In light of the District Court's failure to properly instruct on that standard, and in light of the nature of the sole incident claimed by Price, this error could hardly be said to be "harmless."

read and reconciled together; the decision at issue failed to balance the appropriate considerations thereunder.

The District Court relied heavily upon the Eighth Circuit decisions of *United States v. LeCompte*, 131 F.3d 767 (8th Cir. 1997) and *United States v. Sumner*, 119 F.3d 658 (8th Cir. 1997) in its FRE 403 analysis. Those decisions, however, incorrectly imply that there is a presumption in favor of admission; that FRE 415 effectively overrides FRE 403.

The District Court similarly determined that FRE 415 supercedes the FRE 404(b) prohibition of evidence of other crimes, wrongs, or acts "to prove the character of a person in order to show action and conformity therewith." Both the District Court and the Panel, however, failed to consider more recent decisions from the Tenth Circuit as well as from the Eighth Circuit which are more on point herein, and which indicate that no one rule of evidence overrides another.

The District Court and the panel ignored the FRE 403 balancing test set forth in *U.S. v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998). Further, while the District Court cited *U.S. v. Guardia*, 135 F.3d 1326 (10th Cir. 1998), the Court ignored its holding: the Tenth Circuit in fact upheld the exclusion of additional claims of misconduct, noting that the "admission of the testimony would transform the trial of two incidents into the trial of six incidents . . . the subtle factual distinctions among these incidents would make it difficult for the jury to separate the evidence of the uncharged conduct from the charged conduct." *Id.*, page 1332. Similarly, in a 1998 case, the Eighth Circuit also upheld the exclusion of additional

evidence of sexual harassment, on the basis that the probative value was outweighed by the potential prejudice. *Easley v. American Greetings Corporation*, 158 F.3d 974 (8th Cir. 1990).

Neither the District Court nor the panel addressed any of these decisions, nor did either the District Court or the panel address the considerations set forth in *Enjady*, which are as follows:

> Rule 403 balancing in the sexual assault context requires the Court to consider: (1) **how clearly the prior act has been proved; (2) how probative the evidence is of the material fact it is admitted to prove**; (3) **how seriously disputed the material fact is**; and (4) whether the government can avail itself of any less prejudicial evidence. **When analyzing the probative dangers, a Court considers: (1) how likely it is such evidence will contribute to an improperly-based jury verdict; (2) the extent to which such evidence will distract the jury from the central issues of the trial; and (3) how time consuming it will be to prove the prior conduct.** [citing M. Sheft, Federal Rule of Evidence 413: A Dangerous New Frontier, 33 Am.Crim. L.Rev. 57, 59 n. 16 (1995), emphasis added].

In this case, the District Court failed to consider the first three factors, with the result that all three of the anticipated dangers indeed resulted.

The Sixth Circuit panel has merely affirmed in cursory fashion, without any analysis, the admission of highly prejudicial and non-probative evidence of non-parties. The Petitioner respectfully submits that guidance from this Court is needed, to affirm the reasoning of

Enjady and require the analysis as set forth above. The Petitioner Luttrell respectfully submits that the balancing required among the Federal Rules of Evidence should have resulted in the exclusion of the "other bad acts" evidence, and very likely an entirely different outcome at trial.

CONCLUSION

Wherefore, for all the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

WINTER R. HUFF
LAW OFFICES OF JOHN G. PRATHER
P. O. Box 616
Somerset, Kentucky 42502-0616
(606) 679-1626
Attorney for Petitioner

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Nos. 99-5459, 99-5460, 99-5461, 99-5462

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VICKIE WILSON; TAMMY PRICE, Plaintiffs-Appellants/ Cross-Appellees, v. DAVID WEBB, Individually and in his Official Capacity as Superintendent of the Edmonson County Board of Education; DAVID STICE, in his Individual and Official Capacity, Defendants-Appellees, TONY LUTTRELL, Individually and in his Official Capacity as a teacher in the Edmonson County School System, Defendant-Cross-Appellant.	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY **OPINION** (Filed Sep. 13, 2000) NOT RECOMMENDED FOR FULL-TEXT PUBLICATION Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court. This notice is to be *prominently* displayed if this decision is reproduced.

BEFORE: KRUPANSKY, NORRIS, and SUHRHEINRICH, Circuit Judges.

ALAN E. NORRIS, Circuit Judge. Plaintiffs Tammy Price and Vickie Wilson were subjected to sexual misconduct by defendant Tony Luttrell, a teacher at their school.

They brought suit against Luttrell, as well as against the school's principal, defendant David Stice, and the county's school superintendent, defendant David Webb. Plaintiffs alleged violations of Title IX (20 U.S.C. § 1681 *et seq.*), 42 U.S.C. § 1983, and various state laws. The district court granted summary judgment to Webb and Stice. Plaintiffs appeal that decision. A jury found Luttrell liable for § 1983 violations and several state law violations. Luttrell appeals the court's denial of a new trial or judgment as a matter of law. For the reasons described below, we affirm the judgment of the district court.

I.

In the spring of 1993, Edmonson County High School principal David Stice became aware of a rumor that Tony Luttrell was having an affair with his teacher's assistant, student Renee Alexander. Stice investigated the matter by speaking to various individuals, including Alexander's father. Mr. Alexander and his wife did their own investigation, after which Mr. Alexander told Stice that he thought it was purely a rumor. Mr. Alexander and his wife asked that Renee be removed from Luttrell's class, allegedly in order to quell the rumor. Stice did not document his investigation in writing and never reported the matter to David Webb, the Edmonson County Schools superintendent. Later in 1993, Webb learned of the rumor and asked Stice what he knew and whether he had investigated it. Webb also spoke with Mr. Alexander, who indicated that the matter had been satisfactorily resolved.

In August 1993, Webb was made aware of a questionable conversation between Luttrell and two high school

girls (plaintiff Wilson and Becky Sanders Ray) at a football game. A school staff member reported a conversation she overheard having something to do with married men and Luttrell saying "you're not interested; are you." After having the staff member repeat her report to Stice, Webb charged Stice with the responsibility of a complete and thorough investigation. Stice interviewed every individual involved, found nothing improper, met with the staff member to share his results, and reported to Webb. Webb and Stice assumed there was no reason for further investigation and made no formal report. Nonetheless, Webb had a follow-up meeting a few days later with Luttrell and Stice at which Webb suggested that Luttrell not become involved in any way, or socialize, with the students.

In October 1993, Luttrell touched Price's vaginal area for a few seconds as she was trying to move past where he was standing in the doorway of his classroom. There were several witnesses to the contact between Price and Luttrell. Two students indicated that they saw the contact, although in subsequent questioning by school officials they responded affirmatively to a question as to whether it was possible that the contact could have been accidental. A teacher testified that Price walked into Luttrell from behind as she was walking out of the room, looking at another student.

After a few days, Price reported the incident to Dr. Dale Gray, a school counselor. Gray immediately spoke to Stice. Stice reported the incident to Webb, who instructed him to begin an investigation by taking statements from any individuals who might be able to contribute. Stice did not take affirmative action to seek information from

students whose names did not arise in the course of the investigation and, to his knowledge, neither did Webb. Webb immediately sought legal advice from the school board's attorney. He also contacted the Cabinet for Human Resources to report the alleged abuse. Price was removed from Luttrell's class.

Within hours of learning of Price's allegations, Webb met with Luttrell and his wife. Webb told Luttrell to stay away from the school during the investigation. During the investigation, other students also reported incidents of inappropriate touching by Luttrell. Webb believed there had been contact with Price, but found the results of the investigation inconclusive. In a letter to the Education Professional Standards Board ("EPSB"), Webb indicated that he planned to give only a private reprimand because the statements of students were inconsistent and Luttrell consistently denied any inappropriate conduct. Webb removed Luttrell's teaching assistants and told Luttrell to improve his classroom environment, including keeping his door open at all times and not being close to his students. After Luttrell returned to the classroom, Stice monitored him by walking by his room, stopping in the doorway, and occasionally going in and sitting for a few minutes. Sometime after the investigation had been completed, Stice knew that Luttrell or members of his family had been contacting students. Stice asserted that he did nothing about such contact because his jurisdiction stopped at the schoolhouse door. He did not document this knowledge or report it to the police.

When Luttrell testified at trial, he attempted to demonstrate that he could not have touched Price where she said she had been touched. He did this by standing with

his back to a yardstick on which had been marked the approximate height of where Price said she had been touched, presumably at the distance from the yardstick that Price had indicated. From the transcript, it appears that Luttrell was unable to touch the yardstick.

Vickie Wilson testified that in April 1993 Luttrell, alone with her in his classroom, made sexual remarks, touched her breasts, forced her to the floor, removed her pants and underwear, pushed his finger into her vagina several times, and inserted his penis into her vagina. She also testified that he commented to her that his window was covered with black paper, that even if she said anything no one would believe her, and that his door was locked from the outside so he was the only one who could open it from the inside. Wilson said she felt responsible because she had a crush on Luttrell. She also indicated that she felt degraded, humiliated, and embarrassed.

In May 1993, Wilson was again alone with Luttrell in his classroom. According to Wilson, Luttrell made sexual remarks, exposed himself, forced Wilson to the floor, and inserted his penis in her mouth. Wilson bit him and he eventually stopped. She continued to talk to Luttrell after the incident and still felt responsible.

Wilson also testified that on a school trip, while having lunch on a bus, she was sitting with Ray and laughing. When Luttrell asked what was so funny and received no answer, he walked back to the girls, shoved them down into the seat, and snapped the back of Wilson's bra.

In December 1993, Wilson said she was driving with Ray in the evening when Luttrell drove by and signaled for them to pull into a gas station. Luttrell walked over to their car, first going to Ray's side. According to Wilson, Luttrell raised Ray's shirt and bra and touched her breasts, and then put his hand in her shorts or pants and put his finger in her vagina. He then exposed his penis to Ray. Luttrell walked to Wilson's side of the car, making sexual comments to Wilson. He raised her shirt and bra and touched her breasts, then inserted his hand in her underwear and pushed his finger in her vagina. He also exposed his penis to Wilson.

Ray testified that Luttrell exposed himself; she undid her pants and let him touch her; and he brushed his hand against her breasts. Ray did not look to see if he did the same with Wilson, but she assumed he did. On cross-examination, Ray admitted that she had lied at a deposition when she said she and Wilson had not conferred before grand jury proceedings. Ray also testified that she had told people Wilson was not telling the truth about Luttrell. Luttrell also presented two witnesses suggesting that it would have been difficult for him to have sexual contact with Wilson in his room during lunch.

Wilson reported some incidents with Luttrell at a school board meeting in February 1994. The day after the meeting, Webb directed Stice to investigate the allegations and contacted Social Services, which began its own investigation, as did the Kentucky police. A day later, Webb told Luttrell that he would need to stay away from the school during the investigation. In his investigation, Stice interviewed Wilson and asked her for the names of

any students who could confirm her claims. He interviewed people named by Wilson, anyone they named, and people who came forward voluntarily.

At the February board meeting, another driver for the school, Paula Blanton, indicated that she had seen Luttrell touching female students on their buttocks as they entered and exited Luttrell's bus. Luttrell's wife gave Webb evidence that Blanton had been convicted of shoplifting. Webb indicated to Blanton that the conviction might be used against her; according to Webb, he was trying to reassure Blanton by bringing up the conviction. Blanton said Webb told her that, if she continued with her allegations, her past would be brought out against her.

During the investigation of Wilson's allegations, neither Stice nor Stacey Raymer, a school counselor participating in the investigation, affirmatively sought information from students or teachers whose names did not arise in the investigation. Webb indicated that he did not direct Stice or Raymer to go out and only get statements from people out to get Luttrell or people who were supportive of him. Instead, he indicated that he felt they needed to ensure a fair and open investigation and take statements from anyone who had an opinion or anything to say regarding the ongoing investigation. Webb indicated that the investigation may have been too open in allowing statements in support of Luttrell, but that he thought that said something about Luttrell's character at the time. Webb and Stice did not reprimand two district employees alleged to have taken actions that may have intimidated witnesses.

In March 1994, Don Van Natta of Social Services sent a letter to Webb indicating that the Luttrell investigation showed that allegations were substantiated with respect to sexual abuse, emotional abuse, and caretaker neglect. The letter also indicated that investigation of a number of allegations was not yet completed. In July 1994, Webb began proceedings to terminate Luttrell's teaching contract and immediately suspended him without pay. In the same time period, Webb, Stice and Raymer discussed problems they had with the police and Social Services. Webb asked Raymer to draft a statement of concerns about the other agencies investigating Luttrell. Stice and Raymer both wrote statements criticizing the agencies and referring to Luttrell's swinging his arms.

A tribunal hearing was held in September 1994 regarding Luttrell's termination. Wilson did not allege rape or forced oral sex until this hearing. Webb reported those allegations to Social Services and the EPSB shortly thereafter. At the hearing, Webb selected the witnesses to testify. Many witnesses testified, including Van Natta, Detective Bill Jenkins (who had been investigating Luttrell), Stice, Price, Ray, Wilson, and Webb. At the hearing Webb noted that statements of students alleging inappropriate touching on the bus were dated, the girls had not made timely reports to school officials, and the girls continued to take Luttrell's bus. Webb also indicated to the hearing tribunal that he found it strange that the bus students could not provide any witnesses. The record in this case indicates that at least one student stated that she witnessed an inappropriate touching of another student. Webb also told the tribunal that Luttrell slings his hands around a lot and indicated that he had some doubt about

whether Blanton could see something happening in Luttrell's bus from her bus, 150 feet away. The tribunal decided not to terminate Luttrell's contract, but suspended him without pay for the remainder of the 1993-94 school year and the entire 1994-95 school year.

An Edmonson County grand jury also considered charges against Luttrell. During his testimony before the grand jury, Webb said that he thought Wilson would not have made her allegations if Luttrell's house had not been vandalized, an act of which Wilson was accused and for which she was lectured by Luttrell's family at around the time she came forward with her allegations.

As a result of the incidents described above, plaintiffs filed suit. Defendants Webb and Stice filed motions for summary judgment. The court granted the motion with respect to the § 1983 claim brought against defendants in their individual capacities, finding that Webb and Stice did not demonstrate deliberate indifference towards plaintiffs. After allowing defendants to file a motion for summary judgment on the state law claims following the deadline for dispositive motions, the court granted the motion. The court found that plaintiffs were not entitled to prevail on their intentional infliction of emotional distress claim because they failed to respond to defendants' arguments. Addressing the merits, the court indicated that none of the conduct attributed to defendants was outrageous and intolerable. As for Price's negligence claim, the court found that defendants were not on notice that Luttrell was sexually harassing or abusing students and adequately reacted to previous incidents. To the extent Wilson alleged incidents that occurred after Price made her allegations, the court found that defendants

took appropriate actions following Price's report and could not have reasonably anticipated any injuries to Wilson. The court also granted defendants' motion on plaintiffs' § 1983 official capacity claim, finding that Webb was the final decisionmaker, and there was no showing that the district had a policy or custom reflecting deliberate indifference. The court granted summary judgment to defendants on plaintiffs' Title IX claims, holding that no reasonable fact-finder could disagree that the school had responded adequately and effectively to negate liability. Finally, the court awarded costs to Webb and Stice.

Luttrell filed counterclaims against Wilson, alleging wrongful civil proceedings, invasion of privacy, intentional infliction of emotional distress, and abuse of process. The court partially granted Wilson's motion for summary judgment with respect to the wrongful civil proceedings and invasion of privacy claims. The court denied her motion with respect to the intentional infliction of emotional distress and abuse of process claims. After trial, the court amended the judgment to reflect that the remaining counterclaims were dismissed.

Luttrell filed a motion to dismiss the complaint for failure to state a claim. The court denied the motion, finding that the acts alleged were clothed in public authority and stature and that schoolchildren have a protected liberty interest in their bodily integrity that is violated by physical sexual abuse by a school employee. Luttrell later moved to dismiss Price for failing to comply with the statute of limitations because she did not remove her next friend from the case within one year after she reached the age of majority. The court denied this motion.

Before trial, Luttrell filed a motion *in limine* to exclude certain evidence, which was granted in part and denied in part. The court declined to exclude evidence from non-plaintiffs of misconduct by Luttrell. The court applied Federal Rule of Evidence 415 to allegations of physical misconduct and found that all factors were satisfied in plaintiffs' favor. The court applied Rules 404(b) and 403 to allegations of non-physical misconduct and determined that the evidence was admissible.

The jury found in favor of plaintiffs, concluding that Luttrell violated their rights under § 1983 and committed the tort of third-degree sexual abuse. The jury also found that Luttrell committed the tort of indecent exposure against Wilson and committed battery upon Price. The jury awarded Wilson $51,000 in compensatory and $100,000 in punitive damages. Price was awarded $100,000 in compensatory and $200,000 in punitive damages.

After trial, the court denied Luttrell's motion for judgment or for a new trial. The court explained its decision only with respect to the jury selection. In the jury selection process, Juror 21 indicated that she had a 15-year-old daughter and was hostile toward child sexual abusers. She had also been subjected to physical sexual and non-sexual abuse. She was apparently emotionally distressed while disclosing this information, but indicated that she could be impartial. The court declined to strike her for cause. Luttrell asserts that he had to use a peremptory strike for Juror 21. The court found no error in refusing to dismiss Juror 21 for cause because the juror said she could fairly consider Luttrell's liability based upon the evidence. Another juror who was seated, Juror

12, allegedly failed to acknowledge being a co-worker of the father of a witness. The court indicated that Luttrell failed to meet his burden of showing he deserved a new trial because Juror 12 may have worked with a witness' father.

The court granted plaintiffs' motion for attorneys' fees and costs, but substantially reduced the amount requested because of deficiencies in documentation and the lack of success on claims against the school district.

II.

A.

We begin by discussing plaintiffs' appeal regarding the motions for summary judgment of Webb and Stice. This court reviews *de novo* the district court's grant of summary judgment. *Toledo Ticket Co. v. Roadway Express, Inc.*, 133 F.3d 439, 441 (6th Cir. 1998). The proper inquiry on appeal from a grant of summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). This court views the evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

1. Title IX Claims

Plaintiffs argue that the court erred in its decision with respect to their Title IX claims. The Supreme Court

has indicated that a school official, who must at a minimum have authority to address alleged discrimination and institute corrective measures, can be liable for damages under Title IX. To be liable, the official must (1) have actual knowledge of discrimination; and (2) fail adequately to respond in such a way that the response amounts to deliberate indifference to discrimination. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290-91 (1998). *Gebser* was decided after the district court granted summary judgment to Webb and Stice on the Title IX claims. After *Gebser* came out, however, the court held that it would not change its Title IX decision because it had already decided defendants did not act with deliberate indifference when addressing the § 1983 claims. We note that it is debatable whether Webb and Stice had actual notice. Nonetheless, we affirm based on the reasoning of the district court with respect to the absence of deliberate indifference. *See Wilson v. Webb*, No. 1:94-CV-45-M (W.D. Ky. filed Sept. 30, 1996); *Wilson v. Webb*, No. 1:94-CV-45-M (W.D. Ky. filed Nov. 10, 1997); *Wilson v. Webb*, No. 1:94-CV-45-M (W.D. Ky. filed Aug. 5, 1998).

2. Section 1983 Claims

Plaintiffs maintain that the court erred in granting summary judgment on the section 1983 claims against Webb and Stice. Both parties agree upon the standard that should apply to claims against school administrators in their individual capacities, which requires a showing of deliberate indifference by the defendant. *See Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 454 (5th Cir. 1994); *see also Doe v. Claiborne County, Tenn.*, 103 F.3d 495, 513 (6th Cir. 1996). We affirm based upon the reasoning of the

district court, which found no deliberate indifference. *Wilson v. Webb*, No. 1:94-CV-45-M (D.Ky. Sept. 30, 1996).

With respect to the official capacity claims, plaintiffs maintain that defendants' failure to act amounted to a policy or custom of the school district. We agree with the district court that only Webb had the final policymaking authority sufficient to subject the school district to liability. *See Adkins v. Board of Educ. of Magoffin County, Ky.*, 982 F.2d 952, 957 (6th Cir. 1993); Ky. Rev. Stat. Ann. §§ 160.370, 160.390, 161.790(3) (Banks-Baldwin 1999). Because Webb's actions were not personally indifferent, he could not have acted in such a manner as to create a policy of deliberate indifference that would subject the district to liability. *See Jane Doe "A" v. Special Sch. Dist.*, 901 F.2d 642, 646 (8th Cir. 1990); *Gates v. Unified Sch. Dist. No. 449*, 996 F.2d 1035, 1042 (10th Cir. 1993).

Plaintiffs also assert that they were injured by the inadequate investigation because they were ostracized and harassed by their fellow students and teachers at the school, the manner of the investigation multiplied plaintiffs' humiliation, and Price had to attend school with Luttrell once his suspension ended. Plaintiffs fail to cite any case suggesting that the asserted injuries amounted to violation of their constitutional rights, nor did they refer to such injuries in their complaints. Therefore, this argument is not well-taken.

3. State Law Claims

Plaintiffs argue that the court should not have granted Webb and Stice's request to file a late motion for summary judgment on the state claims of negligence and

intentional infliction of emotional distress. Plaintiffs have waived this argument by failing to explain why the court erred. *See McPherson v. Kelsey*, 125 F.3d 989, 995-96 (6th Cir. 1997) (citation omitted) (issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.).

With respect to the merits of the motion, defendants argue for the first time on appeal that sovereign immunity bars the claims. *See Mixon v. Ohio*, 193 F.3d 389, 397 (6th Cir. 1999) (holding that sovereign immunity may be raised for the first time on appeal because it involves a question of jurisdiction); *Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833, 836 (6th Cir. 1997). The Kentucky Constitution provides that the "General Assembly may, by law, direct in what manner and in what courts suits may be brought against the Commonwealth." KY. CONST. § 231. Local school districts fall within this provision, which provides for sovereign immunity against liability for torts. *Clevinger v. Board of Educ.*, 789 S.W.2d 5, 10-11 (Ky. 1990). Therefore, the allegations against Webb and Stice in their official capacities are barred by sovereign immunity. *See Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) (indicating that official-capacity suits are treated as suits against the entity).

Webb and Stice are also immune in their individual capacities. Public officials exercising a discretionary function are entitled to absolute immunity from liability as long as their official acts are within the general scope of their authority. *See Franklin County, Ky. v. Malone*, 957 S.W.2d 195, 201 (Ky. 1997). Webb and Stice were exercising discretionary powers. They exercised judgment, and

could choose between options of how to pursue the complaints presented to them. *See id.* For these reasons, the district court correctly granted summary judgment on the state claims.

4. Award of Costs

Finally, plaintiffs argue that the court erred in awarding costs to Webb and Stice because plaintiffs are two schoolgirls from poor families who suffered sexual abuse at the hands of a school employee. The district court's decision with respect to costs was not clearly erroneous. *See White & White, Inc. v. American Hosp. Supply Corp.*, 786 F.2d 728, 731-32 (6th Cir. 1986) (holding that good faith of the non-prevailing party is an insufficient basis to deny costs and indicating that a court should not consider the prevailing party's ability to bear its own expenses); *see also Smith v. Southeastern Penn. Transp. Auth.*, 47 F.3d 97, 99-100 (3d Cir. 1995) (per curiam) (pointing out that even parties proceeding *in forma pauperis* can be assessed costs).

B.

Next, we turn to Luttrell's appeal of the court's decisions. This court reviews *de novo* a district court's denial of a motion for judgment as a matter of law. *See Pouillon v. City of Owosso*, 206 F.3d 711, 719 (6th Cir. 2000). Judgment as a matter of law is appropriate only when there is a complete absence of fact to support the verdict, so that no reasonable juror could have found for the nonmoving party. *See id.* A district court's denial of a new trial will be overturned only upon a finding that the district court

abused its discretion. *See Becht v. Owens Corning Fiberglas Corp.*, 196 F.3d 650, 655 (6th Cir. 1999). This court also reviews evidentiary rulings for an abuse of discretion. *See In re Air Crash Disaster*, 86 F.3d 498, 526 (6th Cir. 1996).

1. Section 1983 Claim

Luttrell argues that plaintiffs failed to state claims under section 1983. The initial inquiry in a § 1983 action must focus on (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of a constitutional right. *See Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986). Luttrell maintains that he was not acting under color of state law and that no constitutional violation was established.

a. Acting Under Color of State Law

First, Luttrell argues that he could not have been acting under color of state law because his actions were prohibited by state law. The cases he cites in support of this position are not directly on point and are unpersuasive. *See Barney v. New York*, 193 U.S. 430, 437-38 (1904); *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982). He also maintains that he did not have any authority to engage in the conduct at issue. The very case cited by Luttrell, however, implies that a defendant would have been acting under color of state law had he been performing his duties as a teacher at the time of the improper actions. *See D.T. v. Independent Sch. Dist. No. 16*, 894 F.2d 1176, 1190-91 (10th Cir. 1990); *see also Taylor Indep. Sch.*

Dist., 15 F.3d at 452 n. 4 (indicating that a teacher's conduct is taken under color of state law if a real nexus exists between the activity out of which the violation occurs and the teacher's duties and obligations as a teacher). Luttrell also maintains that no evidence at trial showed that his conduct was related to his duties as a teacher. Contrary to this assertion, there was ample evidence showing that Luttrell took advantage of his position. Wilson and Price knew Luttrell because he was a teacher. Wilson saw him regularly at the school, went to his classes (using his permission slips to leave her other classes), and was his teaching assistant. While some of the acts alleged by Wilson took place off-campus and outside of school hours, she also alleged acts that took place at school and on a school trip. *Cf. Claiborne County, Tenn.*, 103 F.3d at 500-01, 511 (indicating that court implicitly held that teacher was state actor and therefore constitutional injury occurred under color of state law in case where abuse took place both on and off campus). Price was Luttrell's student and her incident happened while she was walking out of his class. Luttrell was acting under color of state law.

b. Deprivation of Constitutional Right

Second, Luttrell maintains that there was no constitutional violation. He acknowledges that students have a right to bodily integrity, but argues that the acts alleged by plaintiffs are not egregious enough to violate this right.

Luttrell's argument is made in terms of a failure to state a claim. To the extent that Luttrell is appealing the

denial of his motion to dismiss, he cannot prevail. This court has indicated that a plaintiff may have stated a substantive due process claim based on allegations that a teacher placed his hands between a student's breasts, fondled her buttocks, and secured duplicate keys to her room on school road trips. *See Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 720, 725-27 (6th Cir. 1996). Plaintiffs' comparable allegations in their complaint are sufficient to have stated a claim.

With respect to Wilson, Luttrell argues that her contacts with him were the result of her own aggressive pursuit of him. To the extent Luttrell is arguing for failure to state a claim, Wilson did not indicate in her complaint that she consented to the contacts. To the extent Luttrell might be arguing that the evidence would not support the verdict because of consent, review of the evidence in this case demonstrates that a reasonable jury could hear the evidence and believe that acts between Luttrell and Wilson were not consensual. We also note that Luttrell's theory at trial did not appear to be that Wilson consented, but that the acts never occurred.

Luttrell also correctly maintains that a "shocks the conscience" standard applies to this case. *See Lillard*, 76 F.3d at 725. In *Claiborne County, Tenn.*, this court held that:

> [A] schoolchild's right to personal security and to bodily integrity manifestly embraces the right to be free from sexual abuse at the hands of a public school employee. . . . To be sure, the magnitude of the liberty deprivation that sexual abuse inflicts upon the victim is an abuse of governmental power of the most fundamental sort; it is an unjustified intrusion that strips the

> very essence of personhood. If the "right to bodily integrity" means anything, it certainly encompasses the right not to be sexually assaulted under color of law. This conduct is so contrary to fundamental notions of liberty and so lacking of any redeeming social value, that no rational individual could believe that sexual abuse by a state actor is constitutionally permissible under the Due Process Clause.

103 F.3d at 506-07. This language indicates that sexual abuse of a student by a teacher is a constitutional deprivation, which implicitly indicates that such abuse shocks the conscience. The third degree sexual abuse and indecent exposure by a teacher, as described in the jury instructions, would fall under the type of actions found in *Claiborne County, Tenn.* to be constitutionally impermissible. Therefore, the conduct in this case was a constitutional deprivation.

2. *Statute of Limitations*

Luttrell argues that Price's claims should have been dismissed as time-barred. He maintains that one year after Price had reached the age of majority, she made no motion to substitute herself as the real party in interest. *See* KY. REV. STAT. ANN. § 413.140 (Banks-Baldwin 1999) (one-year statute of limitations for an injury to a plaintiff or his child); *Wilson v. Garcia*, 471 U.S. 261, 268-69 (1985) (indicating that state statutes of limitations apply to § 1983 claims). However, Price was always the real party in interest. *See* FED. R. CIV. P. 17(c); *Lambert v. Corbin*, 194 Ky. 373, 374-75, 239 S.W. 453, 454 (Ky. 1922) (indicating that infant is plaintiff in next friend cases). Her failure to

remove promptly her next friend did not invalidate the proceeding. *See Cozine v. Bonnick*, 245 S.W.2d 935, 937-38 (Ky. 1952) (holding that when the infant comes of age, his representative passes out of the case and it proceeds in the name of the infant). Nor does Luttrell appear to have been prejudiced by Price's failure to remove her next friend when she reached the age of majority; shortly after Luttrell pointed out the failure, the next friend asked to be removed from the case. *Cf.* FED. R. CIV. P. 17(a). The court did not err by granting the motion to remove and denying the motion to dismiss.

3. *Sufficiency of Evidence for the Verdicts*

a. Wilson

In arguing that the verdicts were not supported by the evidence, Luttrell maintains that the verdicts were inconsistent with respect to Wilson and the inconsistencies reveal deficiencies in the evidence and instructions. Luttrell also argues that the evidence in his favor was much more substantial and credible, so that a jury could not reasonably find in Wilson's favor. There was not a complete absence of fact to support the verdict; therefore, the court correctly denied the motion for judgment as a matter of law. *See Pouillon*, 206 F.3d at 719. Furthermore, while there was evidence that countered the evidence presented by Wilson, the verdict was not against the clear weight of the evidence. There was no abuse of discretion in the denial of a new trial.

b. Price

Luttrell also maintains that Price's claim was not supported by sufficient evidence. He argues that the indication of eyewitnesses that the contact could have been accidental had to outweigh Price's own testimony that the contact was deliberate. He also maintains that a physical demonstration of the event showed that he could not have reached Price's pelvic area. The verdict is not against the clear weight of the evidence. Instead, the jury appears to have reasonably credited Price's own perception over the perceptions of Luttrell and students who testified only that the contact was possibly accidental.

4. Improper Admission of Irrelevant or Unduly Prejudicial Evidence

Luttrell asserts that the court erred in admitting evidence of his sexual abuse and harassment of other students. We find no abuse of discretion in the court's decision and affirm for the reasons stated by the district court. *See Wilson v. Luttrell*, No. 1:94-CV-45-M (W.D. Ky. filed Apr. 6, 1998).

5. Testimony of Relations with Alexander and Smith

Luttrell contests the court's decision to allow Wilson's testimony that Luttrell had told her he had sex with Renee Alexander and Nicole Smith. According to Luttrell, the court determined to allow this testimony under Federal Rule of Evidence 801(d)(2)(A) as an admission by a party-opponent. Luttrell has failed to indicate to this court where the district court addressed this matter.

See FED. R. APP. P. 28(a)(9). We note that the district court's decision on Luttrell's motion *in limine* addressed rumors of relationships, not a statement by Luttrell to Wilson. We also note that the record reveals that Wilson testified at trial without objection regarding Luttrell's statement. We decline to find plain error in the court's decision to allow Wilson's testimony. *See United States v. Fortson*, 194 F.3d 730, 734, 736-37 (6th Cir. 1999) (affirming, on plain error review, court's decision to admit testimony by individual that defendant threatened him as an admission by a party-opponent).

6. Opinion of Rampenthal

Luttrell complains that the court erred in allowing Wilson's therapist, Jenny Rampenthal, to express an opinion even though she had not been identified as an expert witness. Federal Rule of Civil Procedure 26(a)(2) requires the disclosure of the identity of any person who may be used to present expert testimony. Plaintiffs adequately identified Rampenthal because she was listed on Luttrell's witness list, and plaintiffs indicated they would call anyone on that list. Nor has Luttrell alleged or demonstrated that Rampenthal was retained or specially employed to provide expert testimony in the case or that her duties as an employee of a party regularly involve giving expert testimony, which would implicate other requirements in Rule 26.

7. Exclusion of Evidence Regarding Price

Luttrell argues that the court erred in refusing to allow him to present evidence of certain conduct by Price.

We find no abuse of discretion and affirm for the reasons stated in the district court's sealed order. *See Wilson v. Luttrell*, No. 94-CV-45-M (W.D. Ky. Apr. 23, 1998).

8. Failure to Allow Avowal Testimony of Alexander

Luttrell also argues that he should have been allowed to present Alexander's avowal testimony as to the source of the rumor of a sexual relationship between her and Luttrell. Luttrell has failed to point to the place in the record where he asked for, and was refused, the opportunity to present this evidence. *See Fed. R.App. P.* 28(a)(9). Furthermore, he refers only to Wilson's testimony regarding a statement made to her by Luttrell concerning the existence of a sexual relationship between Luttrell and Alexander. This testimony did not refer to Wilson hearing a rumor, making Alexander's testimony irrelevant.

9. Excessive Damages

Luttrell maintains that the damages were excessive and resulted from a jury inflamed by passion and prejudice. He suggests that an award of $451,000 against a school teacher is clearly the result of passion and prejudice, yet cites no case law to support this assertion. In the absence of any law to support his position, Luttrell's argument is unpersuasive. Luttrell also argues that the jurors were inflamed by improper incitements by opposing counsel. Review of counsel's statements fails to reveal improper incitements. Furthermore, the jury was instructed that counsel's statements are not evidence.

In the absence of undue passion and prejudice on the part of the jury, this court reviews for abuse of discretion the court's refusal to grant a new trial based on excessive damages. *See Skalka v. Fernald Envtl. Restoration Mgmt. Corp.*, 178 F.3d 414, 424 (6th Cir. 1999), *cert. denied*, 120 S.Ct. 2687 (2000). A verdict is not excessive unless it exceeds the maximum that a jury could reasonably find to be compensatory for the loss. *See id.* at 424-25; *see also Rodgers v. Fisher Body Div., GMC*, 739 F.2d 1102 (6th Cir. 1984) (assessing whether verdict is shocking or manifests plain injustice).

There was no abuse of discretion in the decision to deny a new trial on this issue. Plaintiffs were subjected to sexual misconduct at a vulnerable age by a teacher. Luttrell's attempt to minimize the Price incident is unpersuasive. Luttrell also questions the smaller award to Wilson, who alleged more egregious acts. Luttrell fails, however, to account for the possibility that the jury may have believed only some of Wilson's allegations or may have perceived differences between the plaintiffs' injuries. Based upon the evidence presented at trial, the verdicts did not exceed the maximum a jury reasonably could find to be compensatory.

Luttrell also maintains that the award of punitive damages was excessive and unsupported by the evidence. Yet, his acts were reprehensible for an adult and a teacher, had a negative impact on the plaintiffs, and suggested the possibility that he would repeat this type of behavior with other students. There was no abuse of discretion in declining to hold a new trial on this point. *Cf. BMW of N. Am. v. Gore*, 517 U.S. 559, 575-76, 580-81, 583 (1996) (pointing to three factors for evaluating when a

punitive damages award is excessive: the degree of reprehensibility of the defendant's conduct; the ratio between compensatory and punitive damages; and the difference between the remedy and the civil or criminal penalties authorized); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991) (finding constitutionally acceptable punitive damages award of more than four times the amount of compensatory damages).

10. Award of Fees and Costs to Plaintiffs

Luttrell maintains that the district court's award of fees and costs to plaintiffs is excessive, despite the significant reductions made by the court. Review of the opinion awarding costs demonstrates that the court thoroughly considered the issues raised on appeal and did not err. *See White & White, Inc. v. American Hosp. Supply Corp.*, 786 F.2d 728, 732 (6th Cir. 1986) (applying clear error review).

11. Counterclaims

Luttrell maintains that the court should not have granted summary judgment on the counterclaims following the jury verdict. Because of the court's prior rulings, the only counterclaims at issue are those for intentional infliction of emotional distress and abuse of process. We affirm for the reasons stated by the district court at the hearing on the motion. *See* Tr. at 1874-83.

12. Jury Instructions

Luttrell presents little discussion of the jury instructions. For the most part, he has waived his appeal regarding the instructions. *See McPherson*, 125 F.3d at 995-96. Luttrell arguably did not waive his appeal with respect to the failure to give the jury a "shocks the conscience" instruction. In a different section of his appellate brief. Luttrell argues that the jury should have been given his proposed instruction setting out the "shocks the conscience" standard. Luttrell's proposed instruction indicated that "the abuse must also amount to a brutal and inhumane action, outrageous and shocking to the conscience." The district court declined to give the proposed instruction, relying upon *Claiborne County, Tenn.*, 103 F.3d 495. *See* Tr. at 1775-77, *Wilson v. Luttrell*, No. 1:94-CV-45-M (D.Ky. May 6-7, 1998). We hold that any reasonable juror would conclude that the conduct described in the jury instructions regarding third degree sexual abuse and indecent exposure would shock the conscience when the conduct is between a teacher and student. Therefore, the court did not commit error in declining to give Luttrell's requested instruction. To the extent it could be suggested that Luttrell did not waive his appeal for the other two instructions described in his brief, involving assault and battery and punitive damages, consideration of the jury instructions as a whole reveals that the instructions were not confusing, misleading, or prejudicial. *See United States v. Sheffey*, 57 F.3d 1419, 1430 (6th Cir. 1995).

13. Jury Selection

Luttrell maintains that he was deprived of his right to a fair and impartial jury. First, he argues that he was deprived of this right because Juror 21 should have been dismissed for cause. He argues that he deserves a new trial because he should not have been forced to use a peremptory strike on her. While the district court may have abused its discretion in failing to strike Juror 21 for cause, any error was harmless. Juror 21 did not sit on the jury and Luttrell has done nothing to show that his jury was not impartial. *See Ross v. Oklahoma*, 487 U.S. 81, 86, 88 (1988) (holding that, as long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve the result does not mean the constitution was violated).

Second, Luttrell argues that he deserved an evidentiary hearing with respect to Juror 12 based upon defense counsel's suggestion, after the trial, that Juror 12 was a co-worker of the father of a material plaintiffs' witness. We find no error in the court's determination that Luttrell had not made a showing sufficient to obtain a new trial and affirm for the reasons stated by the district court. *See Wilson v. Luttrell*, No. 1:94-CV-45-M (W.D. Ky. filed Feb. 19, 1999). Nor do we find error in the court's implicit decision not to hold an evidentiary hearing on the matter.

III.

For the foregoing reasons, the judgment of the district court is **AFFIRMED.**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
BOWLING GREEN DIVISION

CIVIL ACTION NO.: 1:94-CV-45-M

VICKIE WILSON
TAMMY PRICE

PLAINTIFFS

VS.

TONY LUTTRELL **DEFENDANT**

JUDGMENT

- **Jury Verdict.**

This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

The jury found for Plaintiff, Vickie Wilson, and awarded the sum of Fifty Thousand Dollars ($50,000.00) for mental and emotional pain and suffering, embarrassment and humiliation; One Thousand Dollars ($1,000.00) for medical care, including psychological counseling; and One Hundred Thousand Dollars ($100,000.00) for punitive damages, for a total damage award of One Hundred Fifty-One Thousand Dollars ($151,000.00).

The jury found for Plaintiff, Tammy Price, and awarded the sum of One Hundred Thousand Dollars ($100,000.00) for mental and emotional pain and suffering, embarrassment and humiliation, and Two Hundred Thousand Dollars ($200,000.00) for punitive damages, for a total damage award of Three Hundred Thousand Dollars ($300,000.00).

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. Plaintiff, Vickie Wilson, recover from Defendant compensatory damages for injuries resulting from actions of said Defendant in the amount of Fifty-One Thousand Dollars ($51,000.00) and punitive damages in the amount of One Hundred Thousand Dollars ($100,000.00).

2. Plaintiff, Tammy Price, recover from Defendant compensatory damages for injuries resulting from actions of said Defendant in the amount of One Hundred Thousand Dollars ($100,000.00) and punitive damages in the amount of Two Hundred Thousand Dollars ($200,000.00).

3. Plaintiffs recover their costs of this action from Defendant.

IT IS SO ORDERED this the 5th day of August, 1998.

/s/ Joseph H. McKinley
JOSEPH H. MCKINLEY, JR.,
JUDGE
UNITED STATES
DISTRICT COURT

Copies to: Counsel of record

99-5460/5462

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VICKIE WILSON, ET AL., Plaintiffs-Appellees, v. DAVID WEBB, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF THE EDMONSON COUNTY BOARD OF EDUCATION, ET AL., Defendants, TONY LUTTRELL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS A TEACHER IN THE EDMONSON COUNTY SCHOOL SYSTEM, Defendant-Appellant.	ORDER (Filed Oct. 30, 2000)

BEFORE: KRUPANSKY, SUHRHEINRICH, and NORRIS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green
Leonard Green, Clerk